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Hon. JOHN F. DILLON, Editor. }
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Cases in this and Next Number—Acknowledgements.

We print in this number a highly important decision of the Supreme Court of the United States, to which we have heretofore alluded, upon the subject of the validity of sales under deeds of trust, made during the war, the grantor residing within the insurrectionary territory. Also, an interesting opinion of Chief Justice NICHOLSON, of Tennessee, on the question under what circumstances a deed takes effect as an escrow. Also, an important opinion of Judge NAPTON, of the supreme court of Missouri, about a matter of much interest to sheriffs, namely: the manner of proceeding under the statutes of Missouri, to levy executions upon homestead property. Also, an opinion by DILLON, J., in a contest between a sheriff and an assignee in bankruptcy for the possession of the proceeds of property sold at sheriff's sale under levies made before the commencement of the proceedings in bankruptcy.

We gratefully acknowledge the reception of valuable and able opinions, from Judge ROBERT A. HILL of Mississippi, Judge ERSKINE of Georgia, Judge LONGYEAR of Michigan, Judge SAWYER of California, and other judges, attorneys and clerks. These we shall take pleasure in laying before our readers, either in full or in substance, as fast as our space will permit.

An able opinion by Judge KRUM, in the general term of the circuit court of Saint Louis county, Missouri, on the subject of the effect of the war on contracts of life insurance, is in type, and will appear in our next.

We shall also publish, by request, in our next issue, a recent decision by Judge DILLON, on the subject of elevator receipts, and the nature of the contract for storage of grain in elevators.

Legislative Regulation of Railway Tariffs.

Cheap transportation is the inexorable demand of the people; and to aid in securing it, attention is turned to railway regulation by legislative enactment. The indications plainly are, that this subject, in all its aspects, is to undergo the most thorough examination by the press, by state legislatures, by congress, and eventually, by the judicial tribunals.

Any discussion of it in our JOURNAL must be limited to the legal principles involved. The Dartmouth College case (4 Wheat. 518), decided by the Supreme Court of the United States at the February term, 1819, asserted, for the first time, the principle that a charter granted by a legislature to a *private* (as distinguished from a *public* corporation) was a *contract* within the meaning of the clause of the national constitution which prohibits a *state* from impairing the obligations of contracts. Within the class of *private* corporations, according to this decision, fall all companies whose stock is owned by private persons, though their objects and operations are public in their nature, such as railway, bank and canal corporations. The doctrine of this case has been repeatedly re-affirmed in the court by which it was pronounced and by the supreme court of, perhaps, every state in the Union; and, therefore, if any thing *can* be settled by judicial decision, it is, that unless the right to repeal, amend or modify the charter of a railway company is reserved at the time it is created, subsequent *state* legislatures cannot pass laws which essentially change the rights of the corporators or stockholders.

The railway companies, by which the internal commerce of the country is now so largely carried on, have been created solely by the various states, and in most cases, the power of full legislative control over them has not been expressly reserved; and in many instances, the power to the corporations to fix their own tolls or fares and freights, has been expressly granted. Accordingly, it is a well known fact, that the companies seek shelter under their charters, and the Dartmouth College case, from the threatened legislative regulation of tariffs; and it is a question now before the United States Supreme Court, under the 25th section of the judiciary act, or on its way there from the judgment of the supreme court of Minnesota, sustaining the validity of the railway tariff law of that state, passed in 1871, whether the doctrine of the Dartmouth College case can be invoked as a shield to protect the companies from legislative control by the states over their charges for carrying freights and passengers. An opposite conclusion, denying the power of the states, was reached by the court of appeals in Delaware, in the case of the Phila. & Balt. R. R. Co. v. Bowers, decided at the January term, 1874, the decision being based by the court upon what it regarded as the doctrine of the Dartmouth College case.

Practically, the real question would seem to be, not so much whether the Dartmouth College case is sound law,—for the hope that it will be overruled is scarcely entertained,—as whether it really applies to a railroad which is *publici juris*, and which has been so declared by the Supreme Court of the United States in the recent case of Olcott v. The Supervisors, 16 Wall. 678. In this case, Mr. Justice STRONG, after asserting the principle that railways are public, says, *arguendo*: "The railroad can, therefore, be controlled by the state. Its use can be defined; its tolls and rates for transportation may be limited." The case, however, was one in which the right of the state to amend or repeal the charter was expressly retained.

In the American Law Review for January, 1874, an extremely acute, and very able writer, has an article of fifty pages on the Dartmouth College case, in which he forcibly questions the soundness of every proposition on which it rests. The article embodies much research and reflection; and whoever reads it, will need to have his faith in the Dartmouth case re-assured by reading again the opinion of the great chief justice, which is marked with all his subtle and wonderful powers of reasoning. But the doctrine of that case, even if applicable to state laws, respecting railway tariffs, does not touch the *power of the general government*, so far as that power exists by virtue of the clause of the constitution which gives to congress "power to *regulate commerce among the several states.*" And it is on this ground, namely, that the states can only prescribe tariffs for purely *internal commerce*, that is, from points to points wholly within the state, and have no power over rates on lines beyond their limits, and that the power over inter-

state commerce exists, and exists only, in congress—we say it is on this ground that Mr. McCRARY of Iowa, chairman of the committee on railways and canals, an able lawyer and faithful legislator, bases his bill for federal regulation of tolls, fares and freights, upon inter-state railways. The elaborate report with which he accompanies his bill, shows that he has profoundly studied the subject in all its legal aspects; and it will undoubtedly be gratifying to him to see that the views which he so forcibly presents, as to the plenary powers of congress over the subject of inter-state commerce, including the regulation of compensation to the common carrier, are, in all substantial respects, in harmony with the opinion of the eminent author of the American Law of Railways, as contained in his article on the subject which has just appeared in the January number, 1874, of the American Law Register. In this article, Judge REDFIELD maintains both the necessity and lawfulness of congressional railway supervision and regulation; and that the power of congress over charges upon inter-state railway lines is *exclusive* of the several states. He says: "There is no hope of relief from any imaginable source but in the national prerogatives. * * * If we cannot reform this evil [unreasonable charges and unjust discriminations,] through independent legislation in the rightful quarter, and pure judicial administration, we shall attempt it in vain by other inventions. * * * The first enactment of congress should contain a declaration that the act shall extend only to such transportation as passes, or is intended to pass, the lines of two or more states. It should also give the national courts jurisdiction in all cases arising under the act. It should make the subject of commerce among the states, either a distinct department of the national government, or subject to the control of a board of commissioners, paid for their whole time, which shall be devoted to the enforcement of the law. The law should require uniform rates for the same service, and no discrimination."

Our only purpose in this article has been to advise our readers of the current legal discussions on this important topic, rather than to express, at this time, views of our own. We shall refer to the subject hereafter.

The Virginia Duel Murder.

The trial of W. Page McCarty, for the murder of John B. Mordecai in a duel, in the hustings court, at Richmond, Virginia, before Judge GUIGON, was, on the 24th instant, brought to a farcical termination by the jury returning a verdict of guilty of *involuntary* manslaughter, and fixing the punishment at a fine of $500. The telegraphic report states that a few minutes after the case had been given to the jury, they returned and asked for instructions as to whether they were required to find a verdict of murder in the first degree or acquit the accused. The judge instructed them that they were not so required. He then, at their request, further instructed them as to the various degrees of murder and *manslaughter*, after which the jury again retired.

If this statement is correct, it is difficult to conceive on what grounds the instructions given can be supported. The deliberate killing in a duel is murder, and nothing but murder; and in those states, where murder is divided into statutory degrees, it is murder in the first degree; because it is done with deliberation and premeditation, with a weapon prepared for the occasion, and by an act intentional of death. As was said by the eminent Judge GASTON of North Carolina, in one of his well-considered judgments, "Deliberate duelling, if death ensue, however fairly the combat may be conducted, is, in the eye of the law, murder. The punctilios of false honor the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the state, and with that wicked purpose which is termed malice aforethought. While, therefore, because of presumed heat of blood, the law extenuates into manslaughter a killing upon such sudden rencounter, although proceeding upon an insufficient provocation, it withholds this indulgence when, from the circumstances of the case, it can be collected that, not heated blood, but a settled purpose to vindicate offended honor, even unto slaying, in defiance of law, was the actual motive which urged on to the combat." State v. Hill, 3 Dev. & Batt. 497.

Therefore, if the proof show a deliberate killing in a duel, to instruct the jury on the law of manslaughter, is to instruct them on a subject utterly foreign to the case; and such an instruction can have no other effect than to confuse and mislead them and break down their consciences. See Harrison v. State, 24 Ala. 67; Shorter v. People, 2 Comst. 193; State v. Shippey, 10 Minn. 223. These instructions seem to have been well calculated to produce the verdict which the jury returned; and this verdict could not have been more complete nonsense, if the jury had found the prisoner guilty of larceny. For if the killing in a duel could, under any circumstances, be manslaughter, it never could be *involuntary* manslaughter; because such a killing is always intentional of death.

If this case has been correctly stated in the public prints, it should seem that the duty of the judge in charging the jury could have been discharged in a single paragraph, by telling them that if they believed from the evidence, beyond a reasonable doubt, that the prisoner deliberately shot and killed the deceased in a duel, he was guilty of murder in the first degree. The jury would then have been obliged to return the legal verdict; and if there had been anything in the circumstances of the case, or in the state of society existing in Virginia, making it unjust or impolitic to execute the sentence, it would have been a proper case for the executive clemency. As it is, we are unable to see how the court can proceed to sentence the defendant for a crime which he clearly did not commit; and are not surprised to learn that immediately after the return of this verdict, his counsel moved to set it aside.

It is but just to say, however, that the instructions of the court find support in the modern doctrine—or rather, in the modern interpretation of an old doctrine—that in criminal trials the jurors are judges of the law as well as of the facts; and that, therefore, in trials of indictments for homicide, the prisoner has a right to have the *whole* law of homicide expounded to the jury. We understand that it has been recently decided in two cases in Tennessee, that in every trial for homicide, the prisoner may require the judge to expound the law of manslaughter to the jury; and that if the judge refuses so to do, it is error, and ground of reversal. Little's case, decided at Jackson, Tennessee, April term, 1873, and a case there cited. The doctrine that in criminal trials the jury are, in a free and unrestrained sense, judges of the law as well as

of the facts, and that the court is, in such a case, a mere *assistant* to the jury, has been pushed to an extreme limit in Tennessee and Georgia, and perhaps in Illinois. In one of these states we have had an opportunity to observe its workings, and believe that it has had a tendency to render the administration of the law in trials for homicide, as unequal and uncertain as the chances of the gaming table.

Title of Purchaser at Execution Sale—Homestead Exemptions.

VOGLER v. MONTGOMERY ET AL.

Supreme Court of Missouri, January 26, 1874.

Hon. WASH ADAMS,
" DAVID WAGNER,
" W. B. NAPTON,
" H. M. VORIES,
" A. T. SHERWOOD, } Judges.

1. **Sales of land under execution—Title of purchasing Creditor—Title of innocent purchaser.**—Where an execution creditor purchases at execution sale, and his judgment is subsequently reversed and restitution awarded, the title reinvests in the execution debtor; but where, before the reversal, the execution creditor conveys to a stranger, who purchases in good faith, he will hold the title unaffected by the reversal.

2. **Homestead Laws, how construed.**—Homestead laws should be liberally construed with the view of promoting the benevolent purpose of securing to a family a home protected from the creditors of the person who is its head.

3. **Levy upon Homestead—Possession of Homestead—Notice to Officer.**—The homestead exemption is for the benefit of the family, and a sale of the homestead under execution is void. The exemption need not be claimed, and the possession and use of property, as a homestead, are notice to the officer making a levy that it is held as such.

4. **———. Appraisement.**—When the homestead exceeds in amount or value the statutory limitation, it is the duty of the officer holding an execution, before making a levy, to proceed under the provisions of the statute to have the homestead appraised and set apart.

5. **Abandonment of Homestead—Fraudulent Conveyance of Homestead.**—The conveyance and repurchase of a homestead without a relinquishment of possession, even though made in fraud of creditors, does not constitute an abandonment of the homestead.

6. **Injunction to restrain Sale of Homestead—Cloud upon title.**—The sale of a homestead under execution will be restrained in equity on the ground that it will cast a cloud over the title of the owner.

Johnson & Botsford for Vogler; *Philips & Vest* for Montgomery, et al.

NAPTON, J. delivered the opinion of the court. This was an application for an injunction to restrain Montgomery, a trustee in a deed of trust from Nussberger for the benefit of Shields, from selling the lot conveyed in the deed on the general ground that such sale would cast a cloud on the title of plaintiff.

The facts appear to be as follows: Vogler acquired the lot and house in the year 1865. Nussberger obtained a judgment against Vogler, about the 4th of Feb., 1868. A few days previous to this, Vogler conveyed the premises to one Suess, and on Jan. 23, 1869, Suess conveyed back the same to Vogler. On Nussberger's judgment an execution issued; the lot was sold under it, and Nussberger became the purchaser, and a deed from the sheriff to him was executed, bearing date August 6, 1868, and recorded Nov. 6, 1868. There was a mistake in the description of the boundaries of the lot in the deed, as there was in the deed by which it was acquired by Vogler, and a second execution was obtained and levied on the lot, and a sale made under it to Nussberger, who received a second deed from the sheriff, dated 20th of August, 1869, with a correct description of the boundaries of the lot. At or previous to this second sale, the sheriff was notified that Vogler claimed the lot as his homestead. No claim had been asserted at the first sale under execution. Vogler was married and had four children, and he and his family lived on the premises. The judgment under which these sales were made was reversed on the 24th of December, 1869. The deed from Nussberger to Montgomery for the benefit of Shields was made on the 16th of Dec., 1869.

The petition in this case sets forth these facts and asks an injunction to prevent Montgomery from selling under his deed of trust. The principal grounds upon which an injunction is asked are: First, that the reversal of the judgment destroyed the title of Nussberger under the execution sales, and, secondly, that Vogler's claim of the property as a homestead, rendered the sale and purchase of Nussberger a nullity; and these are the only questions of importance, whether it be held that it was a case for injunction or not.

There is no question that a reversal of a judgment does not invalidate the sales under executions to strangers who purchase at the sale, but as to parties to the judgment the law seems to be settled otherwise; and if they become purchasers, they take a title subject to the ultimate disposition of the case. In this case, the plaintiff in the judgment buys and of course his title is affected by the infirmity, but he conveys to a third person before the judgment is reversed, and the question is, whether this infirmity attaches to the purchaser. In Gott v. Powell (41 Mo. 420) the court excepted the case where some third person has acquired a "collateral right before reversal." The purchaser in such cases must be regarded as a purchaser without notice, since he buys from a party who derives title from a judgment and execution valid at the time, and really occupies the same position as if he had himself bought at the sheriff's sale. Whilst therefore the title of the plaintiff in the execution would be annulled by the reversal of the judgment, the sale or conveyance by the plaintiff to a third person before the reversal of the judgment, would be valid, and the purchaser, supposing the purchase to be in good faith, would be protected from the risks which his vendor would be subject to. In this case, the deed to Montgomery was made four days before the reversal of the judgment under which Nussberger bought, and so far as this point is concerned, he must be regarded as having acquired a good title.

But, it is further objected that the sheriff's sale was void because of the property being claimed as a homestead, and therefore protected from execution by our statute on that subject.

The construction of our homestead laws, (1 Wagner's Statutes, p. 697,) has never, so far as I have observed, been before this court; so we are left to resort to the general practice of all courts in construing obscure and doubtful provisions of a statute, to carry out as nearly as possible what is believed to be its main scope and design, and in this we may be guided to some extent by adjudications in other states where similar laws have long existed. It seems too well settled in the various courts in the states where the homestead law has been discussed, that such laws, being prompted by benevolent intentions, are to be liberally construed, and in such a way as to promote the design of securing to a family, a home protected from the creditors of the person who is its head.

It is easy to foresee or imagine cases in which the ministerial officers, who are to be governed by it, must be greatly embarrassed in regard to their duty in executing some of its provisions, but we do not propose to anticipate difficulties which may not occur or which future legislation may remove.

The points which arise on the present record have been mostly passed on by courts of last resort having similar statutes to ours.

Our statute limits the homestead in Sedalia, where this case originated, to thirty square rods of ground in extent, and in value not to exceed fifteen hundred dollars. The second section of the act allows the house-keeper, or head of the family, in cases where the limitation is exceeded either as to quantity or value to designate or choose such part as will not exceed the limitation, and provides that where there is such designation or choice, or where there is none made, in either event, the sheriff shall appoint three appraisers to fix the boundaries and location of the homestead, and that the sheriff shall *then* proceed with the levy of the execution on the residue of the real estate.

We infer from this section that in a case where a homestead is claimed, the sheriff cannot proceed with the levy until he has thus appointed appraisers; nor does it seem to be material whether the house-keeper or the head of the family, asserts his claim or not.

It may be that he is absent. This law is for the benefit of the family, the wife and children as well as the head of the family. The occupancy of the house as a family residence, is a fact easily ascertained by the officer. He cannot proceed with his levy, until he has ascertained in the mode directed by the act, the extent and the value of the premises, and that it is beyond the limit protected against executions.

The question of the title, we suppose, was not to be investigated by the sheriff. If the householder had no title, the execution and levy was of course unavailing, and the law was designed to protect his possession. If, however, there was an incumbrance on the property merely, the third section of the act directs how that is to be considered.

In this case it appears that Vogler had, prior to the levy, conveyed his title to the premises to one Suess, and upon this ground it is claimed that he forfeited all the protection which the homestead law gives. If this conveyance was in good faith, and valid, then it is obvious that an execution and a sale under it would convey nothing; but if it was fraudulent, as it doubtless was deemed to be by the execution creditor, then the title was in Vogler, and the homestead law exempted it from execution. It appears to be the received opinion that neither a fraudulent conveyance nor an act of bankruptcy on the part of the head of the family, will produce a forfeiture of the benefits of the homestead exemption. (Cox v. Wilder, 2 Dillon, C. C. 46.) Judge DILLON thinks these laws are chiefly for the benefit of the family, and therefore will not allow the fraudulent acts of the head of the family to subvert the policy of the law, and this opinion was upon our Missouri statute.

As Nussberger then derived no title from either execution, levy or sale, he could convey none to Montgomery, and the proposed sale by Montgomery would convey no title. And this is urged as a reason why no injunction should be allowed.

But it is the true policy of courts to prevent litigation, and a sale by the trustee would undoubtedly cast a doubt over plaintiff's title, and embarrass a sale, if he desires to sell.

The judgment is affirmed with the concurrence of the other judges.

AFFIRMED.

Validity of Sales under Deeds of Trust not affected by the War.

THE WASHINGTON UNIVERSITY v. GEO. B. FINCH, JAMES J. DALY, BANKRUPT, AND EDWARD R. CHAMBERS.

Supreme Court of the United States, January 12, 1874.

Sales under Deeds of Trust—War.—A sale of real estate made under a power contained in a deed of trust executed before the late civil war, is valid, notwithstanding the fact that the grantors in the deed, which was made to secure the payment of the promissory notes, were citizens and residents of one of the states declared to be in insurrection at the time of the sale, and that the sale was made while the war was flagrant.

Appeal from the circuit court of the United States for the districts of Missouri.

John M. Krum, for the plaintiff in error; *John J. Jones*, for defendant in error.

Mr. Justice MILLER delivered the opinion of the court.

James J. Daly and Edward R. Chambers purchased of W. G. Elliot, in March, 1860, certain real estate in St. Louis, Mo. For the principal part of their purchase money they gave him their promissory notes, and to secure the payment of these notes, they made a deed of trust to Seth A. Ranlett, conveying the property thus purchased with authority to sell it in satisfaction of these notes, if they were not paid as they fell due.

The notes were assigned by Elliott to the appellant, the Washington University, and the money being unpaid and due, the real estate so conveyed was sold by Ranlett, in accordance with the terms of the trust deed, to the university, on the 9th day of December, 1872. The trustee made the university, which was a corporate body, a deed for the land, and the university afterwards sold it for value, to one Kimball.

Daly and Chambers were both citizens of the State of Virginia, residing in the county of Mechlenburg, when they bought the land of Elliott, and have resided there ever since. Chambers and Finch, assignees of Daly, who had been declared a bankrupt, filed the bill, on which the present decree is founded, on the chancery side of the circuit court of the United States for the district of Missouri, to have the sale decreed void, and to have the proceeds of the sale of the land of the university to Kimball declared a trust fund for their use; and the court decreed accordingly.

The sole ground of this relief is, that the sale by the trustees took place during the late civil war, and that Daly and Chambers were citizens of the state of Virginia, resident within that part of the state declared by the president to be in a state of insurrection.

The argument is, that, inasmuch as all commercial intercourse was forbidden between the people of the loyal states and those residing in the insurrectionary districts, both by virtue of the act of congress and by the principles applicable to nations in a state of war, all processes for the collection of debts were suspended, and that the complainants being forbidden by these principles to pay the debt, there could be no valid sale of the land for such payment.

The case before us was not one of a sale by judicial proceeding. No aid of a court was needed or called for. It was purely the case of the execution of power by a person in whom a trust had been reposed in regard to real estate, the land, the trustee and the *cestui que* trust all being, as they had always been, within a state whose citizens were loyally supporting the nation in its struggle with its enemies. The conveyance by complainants to Ranlett vested in him the legal title of the land, unless there was a statute of the state of Missouri providing otherwise, and, if there was such a statute, it still gave him full control over the title, for the purposes of the trust which he had assumed. No further act on the part of the complainant was necessary to transfer the title and full ownership of the property to a purchaser under a sale of the trustee.

The debt was due and unpaid. The obligation which the trustee had assumed on a condition, had become absolute by the presence of that condition. If the complainants had both been dead, the sale would not have been void for that reason, if made after the nine months during which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan, it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditor had both a legal and a moral right to have the power, made for his benefit, executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed upon him before the war began. His power over the subject was perfect; the right of the holder of the note to have him exercise that power was perfect. Its exercise required no intercourse, commercial or otherwise, with the complainants. No military transaction would be interfered with by the sale. The enemy, instead of being strengthened, would have been weakened by the process. The interest of complainants in the land might have been liable

to confiscation by the government; yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country, or any other, is shown us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse between citizens of states, which are in a state of public war with each other, but no case has been cited of this kind, even in such a war.

It is said that the power to sell in the deed of trust, required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, inasmuch as it was impossible for such notice to reach complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspaper could never reach him, to delay the sale indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by giving notoriety and publicity of the time, the terms and the place of sale, and the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default, and his property liable to sale at any time, and no notice to him is required.

But the authority of certain cases decided in this court is relied on, in which the effect of the state of the late civil war is considered, in judicial proceedings, between parties residing on different sides of what has been called the line separating the belligerents.

The first of these is that of Hanger v. Abbott. That case laid down the proposition that when a citizen of a state, adhering during that war to the national cause, brought suit afterwards against a citizen residing, during the war, within the limits of an insurrectionary state, the period during which the plaintiff was prevented from suing by the state of hostilities, should be deducted from the time necessary to bar the action under the statute of limitations. It decided nothing more than this. It did not even decide that a similar rule was applicable in a suit brought by the latter against the former; and it decided nothing in the question now before us, even if the sale here had been under a judicial proceeding. [6 Wall. 532.[

Another case is that of Dean v. Nelson, 10 Wallace, 158. If the present had been a sale under judicial order, that case would have some analogy to this, and some expressions more general than was intended may, as this court has already said, tend to mislead. That case was a proceeding within an insurrectionary district, but held by our military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence, and who were forbidden absolutely by the order which expelled them, and which was addressed to them by name, from coming back again within the lines of the military authority which organized the court. Inasmuch, as without their consent, and against their will, they were thus driven from their houses, and forbidden to return by the arbitrary, though probably necessary, act of the military power, we held that a judicial decree by which their property was sold during the continuance in force of this order, was void as to them. To that doctrine we adhere, and have repeated it at this term in the case of Lasere v. Rochereau.

But this court has never decided, nor intentionally given expression to the idea that the property of citizens of the rebel states, located in the loyal states, was, by the mere existence of the war, exempted from judicial process for debts due to citizens of the loyal states, contracted before the war. A proposition like this, which gives an immunity to rebels against the government, not accorded to the soldier who is fighting for that government in the very locality where the other resides, must receive the gravest consideration, and be supported by unquestioned weight of authority before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection, and it rewards the man who lifts his hands against his government by protection to his property, which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war.

The case of McVeigh v. The United States, 11 Wallace, 259, holds that an alien enemy may be sued, though he may not have the right to bring suits in our courts, and that when he is sued he has a right to appear and defend himself. "Whatever," says the court, "may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence."

And this proposition is supported by the authorities there cited, as well as by sound reason. If such be the rule in regard to alien enemies in a war between independent states, it should be quite as applicable, if not more so, between citizens of the same government, who are only enemies in a qualified sense in a civil war. See, also, Masterson v. Howard, of the present term.

We are of the opinion; that the sale by the trustee, in the case under consideration, was a lawful and valid sale, and that complainant's bill should have been dismissed. The decree of the circuit court is, therefore, reversed, with directions to dismiss the bill.

REVERSED.

Husband and Wife Witnesses against each other. —Deed Delivered as an Escrow.

LUCRETIA H. SMITH AND ANNIE GUION, BY NEXT FRIEND, ETC., v. THOMAS R. TUGGLE, ET AL.

Supreme Court of Tennessee, Jackson, Special November Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY, }
" ROBERT MCFARLAND, }
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED, }
" THOMAS J. FREEMAN, }

1 **Competency of Witnesses—Husband and Wife.**—A statute making parties competent as witnesses, does not render husband and wife competent to testify for or against each other.

2. **Escrow.**—In order that a deed executed by the vendor and delivered to a third person shall have effect only as an escrow, it is essential that the conditions upon which it is delivered, should have been agreed upon between the vendor and the vendee.

3. ——. **The Rule more fully stated.**—The rule is said to be, that in every case of escrow, there is a contract of privity between the grantor and grantee. The person to whom the deed is delivered is, by mutual agreement, constituted the agent of both parties. He does not hold the deed subject to the grantor; and it is always in the power of the grantee to entitle himself to the deed, and to the estate, by performing the stipulated conditions. [Acc. Wellborn v. Weaver, 17 Georgia, 275; Carter v. Turner, 5 Sneed, 178.]

4. ——. **The Rule illustrated—Case in Judgment.**—Where the vendors delivered a deed to a third person upon the condition that it should not be delivered to the vendees, until payment of the purchase money should be made direct to themselves, but these conditions had not been agreed upon with the vendees, and were unknown to them, it was held that such third person was the agent of the vendors only; and he having received payment and delivered the deed to the vendees, the vendors cannot maintain a bill in equity to have such deed declared void, nor to enforce a vendor's lien for the purchase money.

6. ——. **Subsequent Purchaser.**—In such a case a subsequent *bona fide* purchaser has a right to act upon the faith that the deed was delivered as it purported to be; and he will not be deprived of his property because of any equities which previous vendors may have, unless upon unexceptionable evidence.

7. **Innocent Purchaser.**—A person who advances his money and takes a deed of trust to secure the debt, occupies the status of an innocent purchaser; otherwise, a person who takes a deed of trust to secure a pre-existing debt.

NICHOLSON, CH. J., stated the case and delivered the opinion of the court.

The bill in this case was filed by Lucretia H. Smith and Annie Guion against Thomas R. and J. J. Tuggle and H. L. Guion, husband of Annie Guion, to have certain deeds to the lot in contro-

versy declared null and void. These lots belonged to complainants as tenants in common. In May, 1862, a deed therefor to McEwen and Taylor, was signed by them, together with H. L. Guion, the husband of Annie Guion, which deed was acknowledged and registered. Afterwards, McEwen and Taylor conveyed the lot, in trust, to F. M. Williamson, trustee, to secure a note for about $18,000, given by McEwen and Taylor, for money borrowed at the time, of one Franciola. The trustee, Williamson, sold the lot to T. R. and J. J. Tuggle, and made them a deed in satisfaction of the note, at $19,000, transferred to them by Franciola. The bill seeks to set aside these several deeds, upon the ground that the deed to McEwen and Taylor was signed and delivered to H. L. Guion, to be delivered to the vendees only on the condition that they should first pay $25,000, the price agreed on, to complainants, and hence that this deed was only delivered as an *escrow*, and because Guion delivered it without any payment being made to complainants, who are charged with notice of the condition, and that the deed is void, It is then alleged that the other deeds were made under circumstances fixing notice of the defect in the title of McEwen and Taylor, and therefore, that they were void. But it is alleged, that if the deed was so delivered as to pass the title to McEwen and Taylor, yet that the purchase money was not paid to complainants, and therefore, that they have a vendor's lien on the land, which they seek to have enforced.

The first question in the case is, whether Annie Guion and her husband, H. L. Guion, were competent witnesses against each other—she having been examined for complainants, and he having been examined for defendants. In their testimony they conflict and contradict each other in many material respects. The chancellor excluded the testimony of the wife entirely, and excluded that of the husband, also, except that he held it competent as against Lucretia H. Smith, the other complainant. We have held, in several cases, that the recent acts declaring that no person shall be incompetent to testify because he or she is a party to the record, or interested in the issue, was not intended to affect the rule of evidence which excludes the husband and wife from being competent witnesses for or against each other. This rule, so far as it rests on public policy, for the preservation of the harmony of the marital relation, continues in full force. In the present case, the husband refused to join his wife as complainant, and hence she has made him defendant, merely to comply with the rule which is assumed in the bill, to require that he must be a party. He has no real interest in the litigation; but according to the testimony of his wife, he received the deed to be delivered to McEwen and Taylor, upon the condition of payment in cash of $25,000, to complainants, and not to her husband; and that he delivered the deed without a compliance with the alleged condition. The husband, in his testimony, denies that he received the deed upon any condition, but insists that he delivered the deed in pursuance of the contract, and received the purchase money for complainants, with their sanction and approval. We think it clear, that it would violate the well settled rules of evidence to hold that such testimony, by either husband or wife, is competent. It comes directly in conflict with the reason on which the rule referred to is based. Nor are we satisfied that the husband could testify in the case, against Lucretia H., the other complainant, without testifying against his wife. The complainants rest their claim to relief on the same title and upon the same allegation, as to the misconduct of the husband.

Without deciding that Guion was incompetent to testify, as against Lucretia H., the co-complainant of his wife, we have examined the case without considering his testimony, which gives to her the full benefit of her own testimony, uncontradicted by his. Excluding the testimony of Mrs. Guion, and not looking to that of her husband, the case rests upon that of Lucretia H. Smith, the other complainant. She states that the property was offered for $25,000, cash; that it was a cash sale. That she and Mrs. Guion signed and acknowledged a paper, on the 30th of May, 1862, which, she thinks, was left in the hands of the clerk, to be handed to Col. Guion, to hold until the money was paid to Mrs. Guion and herself, by McEwen and Taylor; that they never received from McEwen and Taylor the price agreed to be paid, nor from any one; that she had never approved or confirmed Col. Guion's act, in delivering the paper as her deed; that Col. Guion was not her agent; that he had no authority to deliver the paper as her deed until the money was paid to her, and Mrs. Guion; that he delivered it without the knowledge or consent of herself or sister; that Col. Guion had no authority to receive the money. On cross-examination, she states that this paper was left with the clerk to be given to Col. Guion, to hold until the money was paid to complainants by McEwen. She supposes it was agreed that the lot should be sold for currency. She does not know that any instructions were given to the clerk; the paper was left in his hands, and, of course, he would give it to Col. Guion to hold until the money was paid to complainants by McEwen; the paper would then be delivered as a deed to McEwen. On re-examination, she states that it was her understanding that the paper was to be placed in the hands of Col. Guion, to be held by him until the money was paid to complainants, and then it was to be delivered as their deed. The clerk testifies that he has no recollection as to any instructions given him when he took the acknowledgment of the parties and received the deed; but from memoranda on the deed, in his handwriting, he is satisfied that he delivered the deed to the register on the 31st of May, 1862, on which day the same was noted for registration, as appears on the deed. It is proven by McEwen, that on the 31st of May, 1861, he paid to Col. Guion $1,000, in Confederate money, and gave him an order on Taylor, at Columbus, Miss., for $24,000, which Guion received as payment, and that he then received the deed. Witness says he negotiated the purchase of the lot with Lyde, a real estate agent; that he had no knowledge when the money was paid; that the deed was delivered to Guion to be delivered to him only upon condition that the purchase money was first paid into complainants' hands; that nothing was said in his negotiation with Lyde as to the kind of money to be paid.

We think it may be fairly deduced, from this testimony, that it was understood and agreed by the complainants and Guion, that Guion was to take possession of the deed after it was certified by the clerk, and hold it until McEwen and Taylor paid the purchase money to complainants, and then to deliver the deed to McEwen and Taylor; but the evidence fails to show that McEwen and Taylor were parties to this arrangement, or that they knew of it. Under this state of the proof, the deed was not delivered to Guion as an *escrow*. An escrow is a conditional delivery of a deed to a stranger, or third person, to be by him delivered to the grantee—but not until a certain condition is performed, when the deed takes effect. It is said in Wellborn v. Weaver, 17 Georgia, 267, 275, that "in every case of escrow, there is a contract and privity between the grantor and the grantee. The person to whom the deed is delivered, is by mutual agreement, constituted the agent of both parties. He does not hold the deed subject to the control of the grantor; and it is always in the power of the grantee to entitle himself to the deed and to the estate by performing the stipulated condition." This doctrine is recognized by this court in the case of Carter v. Turner, 5 Sneed, 178. In the present case, if it be conceded that Guion was such a stranger, or third person, that he might hold the deed as an escrow, yet the proof fails to show that it was part of the contract between the parties, that McEwen and Taylor were to receive the deed only on condition of paying the money directly to complainants. Such proof was essential to constitute the deed an escrow in the hands of Guion. It follows

that Guion was only the agent of complainants, and that his violation of his instructions as such agent, could not affect the title derived by delivery of the deed to McEwen and Taylor, as it appears that they paid the money and received the deed without any knowledge of the instructions given to Guion by complainants. Blight v. Schenck, 10 Penn. 285; Pratt v. Holman, 16 Vermont, 530; Chitty on Bills, 33; Edwards on Bills and Notes, 92; 1 Parsons on Bills and Notes, 109.

Possession of a deed, by the obligee, is *prima facie* evidence of its execution, McEwen v. Frost, 1 Sneed, 186. The acknowledgment of a deed, and its deposit in the clerk's office, is no delivery, unless the vendee concurred in the act, or afterwards assented to it. McFadgen v. Eisensmidt, 10 Hum. 567. But as the fact of delivery is the assurance of the title, a purchaser for value has a right to act on the faith that it has been signed, sealed, delivered and acknowledged, as it purports to be, in proper form, and by the proper parties; and before such a purchaser can be deprived of his property, the facts which avoid his title must be proved by the grantor by unexceptionable testimony. Blight v. Schenck, 10 Penn. 289. This rule is still more manifestly applicable as between a subsequent *bona fide* purchaser from the first grantee and the grantor.

But it is claimed that if the delivery of the deed to McEwen and Taylor was such as to give them the title, yet that the payment was not a satisfaction of the purchase price for the lot. If the question here was between complainants and McEwen and Taylor, it might be argued with much force, that there was enough on the face of the deed to show to McEwen and Taylor, that the money was going to complainants, and that a payment to Guion under such circumstances, was no satisfaction of the debt to complainants. But the controversy is between complainant and the Tuggles, who claim the benefits of the position of innocent purchasers, for value, without notice of any defect in the title, by reason of a subsisting equity in complainants. This defence is properly made in the pleadings; and by the proof it is shown that the Tuggles succeeded to the rights of Franciola, who advanced his money to McEwen and Taylor, and took a conveyance of the title of the lot to Williamson as trustee, to secure the debt. While the trustee or the beneficiary under a trust deed, to secure a pre-existing debt, cannot defend as a purchaser for value, without notice, yet such a trustee or beneficiary of a deed, to secure a *present* debt for money advanced at the time of the execution, is held to be an innocent purchaser for value; and such purchaser can rely on that defence. According to proof in the case, the Tuggles occupy the position of innocent purchasers; and having the legal title, as well as an equity equal to that of the complainants, they are entitled to the protection of the court.

Upon the whole case, we find no error in the decree of the chancellor, and affirm it with costs.

DECREE AFFIRMED.

Bankrupt Act—Possession of Sheriff under Levy made before Bankruptcy Proceedings were commenced.

CYRUS TOWNSEND, ASSIGNEE IN BANKRUPTCY OF O. H. VIERGUTZ v. THOMAS LEONARD, SHERIFF, ETC., AND CHARLES H. POND.

United States Circuit Court, District of Kansas, November Term, 1873.

Before DILLON, Circuit Judge.

1. **Bankruptcy—Levy of previous Execution.**—Property in the hands of the sheriff, under execution from the state courts levied *before* the proceedings in bankruptcy were commenced, cannot, at the instance of the assignee in bankruptcy, be taken out of the *possession* of the sheriff by the federal courts.

2. ——. ——. **Nature of Sheriff's Possession.**—In such a case, the possession of the sheriff is the possession of the court of which he is the officer, and while his possession as such officer continues, no other court can interfere with it.

Judgments against the bankrupt were rendered in the state court, and levies made thereunder by the sheriff, *before* the proceedings in bankruptcy were commenced. The sheriff has made sales under the levies, and the proceeds are in his hands. This is a bill in equity by the assignee in bankruptcy, against the sheriff and the execution plaintiffs, attacking the judgment, levy and sale, as having been obtained and made contrary to the bankrupt act, and with intent to acquire an illegal preference. The federal district court granted an order restraining the sheriff from paying over the proceeds of the sales to the execution plaintiffs, and the proceeds are still in the hands of the sheriff.

The bill prays for a perpetual injunction against the sheriff from paying over the proceeds to the execution plaintiffs, and asks that the proceeds shall be paid to the complainant, as assignee in bankruptcy. An answer has been filed by the sheriff, and proofs taken, and the cause is now upon final hearing. The other defendants have not answered.

Z. E. Britton and *F. P. Fitzwilliam*, for the plaintiff; *Clough & Wheat*, for the defendants.

DILLON, Circuit Judge:— The property or money, of which the assignee, by the bill of complaint, seeks to obtain possession, is in the hands of the sheriff, and was obtained under an execution, which was issued and levied upon the property of the bankrupt before the proceedings in bankruptcy were commenced. Assuming that the bill in other respects, presents a case of equity cognizance, can this court take jurisdiction of the sheriff and the fund in his hands, and subject him and the fund to its control? That this cannot be done on general principles, is conclusively settled. (Peck v. Jenness, 7 How. 612: Taylor v. Carryl, 20 How. 583; Buck v. Colbath, 3 Wall. 334)

Is the rule in this respect changed by the bankrupt act? The presiding justice of this circuit has held that it is not. (Johnson, assignee v. Bishop, 1 Woolw. C. C. Rep. 324.) And such seems to be the opinion of the Supreme Court of the United States in the recent case of Marshall v. Knox, 8 Bank. Reg. 97; S. C. 16 Wall. 551.

In the case last cited, Mr. Justice BRADLEY says, *arguendo*, that "where an execution on final judgment has been levied by a sheriff prior to the commencement of proceedings in bankruptcy, the possession of the sheriff cannot be disturbed by the assignee; the assignee is only entitled to claim the residue in the hands of the sheriff after satisfying the execution in his hands."

In Johnson v. Bishop, *supra*, Mr. Justice MILLER says: "The possession of the sheriff is the possession of the court, by the command of whose writ he seized the property. And so long as the proceedings in virtue of which it is taken, are pending, that possession will not be interfered with by any other court."

The bill must, therefore, be dismissed; but it will be without prejudice to any other action or suit by the assignee against the said judgment creditors of the bankrupt or either of them.

BILL DISMISSED.

Devise—Construction—Haley v. City of Boston.

We are indebted to Hon. S. J. THOMAS, of Boston, for the following notice of an interesting decision of the supreme judicial court of Massachusetts:

Writ of entry to recover a parcel of real estate. Facts reported by agreement of parties. It appeared that in 1828, Lucy Bullman, a widow, made her will, which at her death, a few years afterward, was approved and allowed. At the date of her decease, her only near relatives were three nieces, one nephew, and one grand-nephew. One of these nieces was then forty-four years old, married, and died in 1849, without having had a child; another was forty-six years old, unmarried, and died in 1869; the other was thirty-nine years old, sick of consumption, and died soon after the will was made. The grand-nephew died without issue in 1849. The nephew died in 1857. The demandants are

his children born after the death of the testatrix. The will was drawn by Mr. C. P. Sumner, at one time a sheriff for Suffolk, and the father of the Massachusetts senator. In the will, after a preamble in which she sets forth that she made it, "Wishing that the property with which God has blessed me, and of which I may die possessed, may, after my decease, go to those of my near relatives and friends for whom I have a regard," she devised, in the second item, to "my two unmarried nieces, my house and land on the south side of Cambridge street; also, my house and land on the west side of Belknap street; also, my house and land on Brighton street." In the third item she bequeathed to her married niece, $100, and provided that "in case she ever becomes reduced and equally needy with her two sisters, then she shall come in and enjoy one equal third of those three parcels of real estate mentioned; but none of the estates are to be sold unless it be to pay debts and legacies; nor are they to be divided and held in severalty; but they are to be leased and the rents and profits are to be divided between the two first named nieces and the latter, if she becomes as needy and dependent as her two unmarried sisters." In the fourth item she authorized her executors to sell her real estate on Brighton street, without license of court, for payment of her debts, and to divide any surplus of the proceeds among the three nieces. In the items next following, to the thirteenth, she gave specific legacies. The thirteenth was as follows:

"My two estates, one on Cambridge street and one on Belknap street, are to go to the three sisters equally; and if either of them die, then to the surviving two; and if two die, then to the single survivor; but if all three die without heirs, then the income of said estates is to go to John William Haley, son of Capt. John B. Haley, of Portsmouth, N. H.; and in case John W. Haley, should die without issue, then my real estate is to go to the city of Boston for the benefit of the poor. It is never to be sold, but the income is to go for the purposes set forth above. But it is always to be understood that Mrs. Dewolf is not to come in for any benefit derived from my real estate until she shall be needy and dependent, as her sisters now are. And she will, in my opinion, be so, if her husband should become insolvent, or should die, not leaving any property for her support."

John W. Haley was the grand-nephew, John B. Haley the nephew. For the demandants, it was contended that the true purpose of the testatrix was to provide, that at the death of the three nieces, their brother, John B. Haley, if living, should take the estate as heir; but if he was then dead, and John W. Haley alone, of all her near relatives, was left, then John W. Haley should take a life estate only; and if he should die without children, that would be the end of the Haley family, and near relatives, and then it should go to the poor—of whom there is no end. Expressed in informal words, her meaning was this: "If, when the last survivor of my nieces dies, their brother and heir is dead, and there are no other heirs than his son, John W., living, then, I do not devise these estates to him absolutely, as he would otherwise take them; because he may die without children, and then there is an end of the Haley family, in which case they shall go to the poor. The purpose was to limit the estate of John W. Haley. Hence the word "heirs" and the word "issue" in the same sentence. To the suggestion that this construction involves the absurdity of providing that in case of the death of these nieces without heirs, the property should go to one who was an heir, there are two answers: First, there is no such absurdity; since if the nieces died, John B. Haley living, John W. Haley was not an heir at all. The father would take to the absolute exclusion of the son. Second, the avoidance of this absurdity, if there were any, would involve the assumption of others still greater. First, that the testatrix should have contemplated that these nieces, at their ages, and in their circumstances, would have children; and second, that she should have intended to disinherit their brother, who was as near a relative as they were.

Opinion by COLT, J. The construction contended for by the demandants makes the thirteenth clause of the will suicidal, and cannot be supported. Judgment for the tenants.

Notes of Recent Decisions.

Foreign Judgment; Service by Publication; Jurisdiction.—Personal judgment, rendered in one state against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the state where rendered of any personal liability to the plaintiff of the parties proceeded against by publication. Board of Public Works of Virginia v. Columbia College, et al; Supreme Court U. S., Oct. Term, 1873.

———; *Constitutional Law; "Full Faith and Credit."*—The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit. Ibid.

———; ———; ———; *Interlocutory decree.*—No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. So held in a case where a party, relying upon a decree of an inferior state court, objected to the character given to the decree as interlocutory by the highest appellate court of that state, and insisted that it should be treated as a final decree. Ibid.

Equity Jurisprudence; Aid of Creditor.—A court of equity will not exercise its jurisdiction to reach the property of a debtor applicable to the payment of his debts, unless the debt be clear and undisputed, and there exist some special circumstances requiring the interposition of the court to obtain possession of, and apply the property. Ibid.

This rule should be insisted upon with rigor whenever the property sought to be reached constitutes assets of a deceased debtor, which have already been subjected to administration and distribution; and some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the representative of the estate, before distribution. Ibid.

Wife's separate property; Husband's debts.—Property acquired by a married woman on the credit of her separate estate, and afterwards paid for by profits arising out of it, is not liable for the debts of her husband. Purman v. Painter, Sup. Court Penn., Jan. 6, 1874; 4 Pittsburgh Legal Jour., N. S., 83.

Claim against United States; Attorney's contingent fee; Lien.—An attorney or counselor at law who successfully prosecutes a claim against the United States, for a contingent fee, being a part of the amount allowed, has a lien upon the fund, which may be enforced against the claimant, even when the money is in the Treasury of the United States; and the court will award an injunction to restrain the claimant from drawing from the treasury such portion of the money allowed, and decree its payment to the petitioner. WYLIE, J., dissenting. [Cases cited: Wylie v. Coxe, 15 How. 415; Painter v. Drum, 40 Penn. State, 467, 470.] Child v. Trist, Supreme Court Dist. Columbia in Gen. Term, Apr. 1873; 1 Wash. Law Reporter, 1.

———; ———; *Not void as against public policy.*—A contract to prosecute such claim before congress is not void as against public policy, when the services are to be rendered in an open and fair presentation of the facts; and where no secret and corrupt means are employed to mislead or deceive the members of the legislative body. Ibid.

———; ———; *Act of Feb, 26, 1853.*—Nor does such an agreement operate as a transfer or assignment of a part, or interest in the claim, so as to make it void under the act of February 26, 1853. It is a method of fixing the compensation in procuring the allowance of the claim. Ibid.

Lease of Real Estate by Church Committee.—A lease of real estate in which the lessors are described as "acting as a church extension committee by authority and on behalf of the general assembly of the Presbyterian church, old school," parties of the first part, and who executed the lease in

their individual names and seals, and which contained reciprocal covenants to be performed by the parties respectively, one of which was to pay rent on the part of the lessee to the lessors, as in their own right, is a nullity. It is a nullity as to the owner, because it is not his contract; and as to the lessors, because they have no estate in the property; and as to the lessee, because it is not binding on the other party. And the rule that a tenant shall not be allowed to dispute his landlord's title, has no application to such a case. [Cases cited: Frontin v. Small, 2 Ld. Raym. 1418; Crode v. Ingraham, 13 Pick. 35; Taft v. Brewster, 9 John. 334; Duvall v. Craig, 2 Wheat. 45; Lutz v. Linthicum, 8 Pet. 165.] Stoot v. Rutherford, Sup. Court Dist. Columb. Gen. Term, Apr., 1873; 1 Wash. Law Reporter, 1.

United States Supreme Court — Decisions Last Week.

[Compiled from the New York Herald.]

Resulting Trust.—No. 126. Kitchen v. Rayburn et al.—Appeal from the circuit court for Missouri.—This was the affirmance of the title of the appellees to certain lands in Missouri which, in the court below, the appellant alleged had been purchased by the proceeds of bonds held by Rayburn in trust for him. Mr. Justice STRONG delivered the opinion.

Judgment on Postmaster's Bond.—No. 143. Jones Randolph et al. v. The United States—Error to circuit court for the southern district of Georgia.—This is the affirmance of a judgment on a postmaster's bond, against his sureties, for a defalcation. Mr. Justice CLIFFORD delivered the opinion.

Certificate of Division; Jurisdiction.—No. 136. United States v. Arwo—Certificate of division from the circuit court for the southern district of New York. Instead of answering the questions certified, the court say that the circuit court had jurisdiction, and direct that this statement be certified to that court, as the only answer required to the several questions presented in the record.

Criminal Law—Fine—Imprisonment—Power of Circuit Court to correct erroneous sentence after sentence has been in part executed.—No. 9, original. Ex parte, Edward Lange.—The case of Edward Lange, a New York merchant, who was convicted of stealing mail bags, furnished his firm by the post office department, which was before the supreme court on certiorari and habeas corpus, was argued January 26th. Lange was sentenced to one year's imprisonment and to pay a fine of $500, and was on the same day committed to jail in execution of the sentence, and on the following day paid the fine. Five days after, at the same term, he was brought up on habeas corpus for his discharge, because of error in the sentence, on the ground that under the law he could not be both fined and imprisoned. Thereupon the sentence was vacated by the judge who pronounced it, and he was sentenced to one year's imprisonment. Upon another writ of habeas corpus the new sentence was affirmed, and it was here contended that the original sentence was illegal and the prisoner should have been discharged on the first habeas corpus, and that the sentence being in part executed, the case was beyond the authority of the court to vacate and re-sentence. It was also maintained that the payment of the fine is a bar to the infliction of imprisonment under either sentence. The government insisted that it is well established as the law of this court, and the general rule of the criminal law, that a sentence passed upon a person, if erroneous, may be vacated, like any other judgment, during the term in which it is pronounced, by the court which awarded it, and the prisoner resentenced according to law. As the power of the court to re-sentence a prisoner is not affected by the fact that he has entered upon the imprisonment ordered by the court under the first sentence, so it cannot be affected by the fact that he had paid the fine. Whether the fine thus imposed may be remitted by judicial authority, is not a question that can be raised in this proceeding; it is sufficient that the fact of its payment does not invalidate the second sentence. William H. Arnoux, for petitioner; Attorney General Williams and Assistant Attorney General Hill, for the government.

It was the opinion of the court that the prisoner was entitled to be discharged, as prayed for in the petition. Dissenting, Mr. Justice CLIFFORD and Mr. Justice STRONG.

Negligence a question of Fact for Jury.—No. 191. Sioux City and Pacific Railroad Company v. Stout—Error to the circuit court for Nebraska.—This was an action to recover for injuries sustained by a child six years of age in playing on a turntable of the company at the town of Blair, in Nebraska. The questions were whether it was negligence on the part of the company to leave the table unenclosed and open to the approach in or near such a village—the company in no other way contributing to the injury—and whether the negligence was a question of law for the court to determine or of fact for the jury. The court below submitted the question to the jury as one of fact, and there was a verdict for the plaintiff. The judgment entered thereon is here sustained, the court holding, in substance, that where there is testimony tending to show negligence, it is for the jury, and not for the judge, to determine the question of proper care, or whether the facts established the negligence alleged. Mr. Justice HUNT delivered the opinion.

Usury—Bankruptcy—A Trustee of a Bankrupt cannot recover a greater Penalty for the taking of usurious Interest than the Bankrupt himself could recover, if solvent and sueing in his own Right.—No. 179. Tiffany v. The Boatman's Savings Institution—Appeal from the circuit court for Missouri.—This was a bill filed by Tiffany, as surviving trustee of one Darby, a bankrupt, to recover money paid to the Savings Institution in discharge of a loan made to the bankrupt, and on which he had paid usurious interest. It was admitted that the bankrupt could not have recovered personally, because he had paid the usury without objection, but it was contended that, being a bankrupt when the usury was paid, the rights of the estate were superior to those of the Institution, and the trustee could not only recover the usury but the entire loan, under the statute against usury. This court hold, in substance, that the fact of usury does not change the transactions between the parties which were lawful, if not tainted with usury, so that Tiffany can recover back the whole sum, when Darby, if sueing personally, could recover only the excess of interest. The trustee has no larger interest than the bankrupt, and is entitled to recover only what Darby's estate was diminished by the transaction. To allow him to recover the whole sum, would be to transfer to the creditors of Darby a sum exceeding $150,000, which he never owned, by way of punishment to the bank for taking excessive interest. A court of equity will not deal with contracts affected with usury in this way. The relief it gives is always based on the idea that the money borrowed, with legal interest, shall be paid. Reversed with respect of certain accommodation notes on which usury was charged but not found below, and the case remanded to enable the circuit court to ascertain in some proper way, the excess of interest paid thereon, and to enlarge the decree so as to recover the sum. In all other respects, the decree of the circuit court was correct. Mr. Justice DAVIS delivered the opinion.

Removal of Causes from State to Federal Courts—Appearance in Federal Court—Estoppel.—No. 192. Home Life Insurance Company v. Dunn—Error to the First Judicial Court of Hamilton county, Ohio. Defendant in error obtained a verdict against the company on a policy of insurance in the court of common pleas of the state. After judgment, a new trial was allowed as a matter of right under the statutes of the state. At the next term of that court, and before further proceedings, the case was transferred to the circuit court of the United States, where transcript was filed and the cause docketed within the proper time. Subsequently, a motion was made to dismiss the case for want of jurisdiction, and, being overruled, plaintiff below was granted leave and filed an amended petition, which is now pending. Thereupon plaintiff below, upon petition in error to the district court of the county, obtained a reversal of the order of removal. The plaintiff in error here then made application to the supreme court of the state for leave to file petition in error to reverse the order of the district court, which was refused, the supreme court thereby, in effect, affirming the order of removal made by the district court. A second trial was then had in the common pleas, which resulted in a judgment for the defendant in error here, which was affirmed by the district court. This writ of error was brought to reverse the order of the district court, reversing the order of removal; and, it is contended that the cause was properly removed, and, being so, it was the duty of the state court to proceed no further in the case. The court hold that the cause was properly removed to the circuit court, and that the plaintiff below, having submitted to its decision on motions therein made, was estopped from prosecuting the case further in the state courts, and

reverse the affirmance and judgment affirmed by the district court, with directions to that court to proceed no further in the case. Mr. Justice SWAYNE delivered the opinion.

Infringement of Patent.—No. 58. The American Wood Paper Co. v. The Fiber Disintegrating Co., and No. 157, the latter against the former—Appeal from the circuit court for the eastern district of New York.—This was a bill filed by the Paper Company to restrain infringements by the Disintegrating Company of several patents, alleged to be the property of the plaintiff, for the manufacture of paper pulp and fiber from wood, straw and other vegetable substances. The decree below found one of the patents void for want of novelty; another valid, and the Disintegrating Company infringers of it; a third was found not to have been infringed. From this decree both parties appealed to this court, and the decree was here affirmed, each party to pay his own costs in this court. Mr. Justice STRONG delivered the opinion. Mr. Justice CLIFFORD dissenting.

Land Law—Spanish Grants—Lands within Tide Water.—The case of Walker v. The Board of Harbor Commissioners of the State of California, from the California circuit, involving the question of the right of the plaintiffs in error to wharf privileges in front of their lands in San Francisco, has been argued before the Supreme Court. The court below held that the premises—the block bounded by Montgomery, Francisco, Sansome and Chestnut streets—were entirely without the boundary line and the water front, and the decree was for the commissioners. This conclusion was assigned as an error here. On the part of the state, it was contended that the case of Weber v. The Commissioners, decided at this term, disposed of all the questions here present. That decision was in favor of the commissioners. Mr. Hall McAllister appeared for the plaintiffs in error and Mr. T. T. Crittenden for the defendants.

The court *hold*, in accordance with the decision of the supreme court of that state in the case of The People v. Davidson, that the alcaldes of the Pueblo of San Francisco possessed no authority to grant any lands covered by the tide waters of the bay, and that, therefore, the grants under which the plaintiff in error claims, were inoperative to pass any title to the premises in question. Mr. Justice FIELD delivered the opinion.

Book Notices.

A QUARTERLY DIGEST OF DECISIONS OF THE SUPREME COURT OF MICHIGAN. By Henry A. Chaney, Attorney at Law. Lansing, Mich.: W. S. George & Co. For one year (4 numbers), $1.00. Single numbers, 25 cents.

Through the courtesy of the editor, we have been favored with the July and October numbers of this publication. We are highly pleased both with its plan and execution. The value to every judge and practitioner of Michigan of a complete abstract of the decisions of his court of last resort, issued very soon after the adjournment of each term, is so obvious, that it is unnecessary to dwell upon it. And when such a work is done, as this manifestly is, with such fullness and painstaking accuracy, that each case abstracted may be confidently quoted in court without the necessity of procuring a transcript of the original opinion, its value is still more enhanced.

The style adopted by Mr. Chaney, in his second number, is to give the cases in alphabetical order, prefixing each one with a brief statement of the county from whence it comes, and the judgment of the supreme court. Then follows a succinct statement of the facts, and this is succeeded by a statement of the points ruled, with running titles to facilitate reference. To each number there is an index. We here give the first two cases of the October number as specimens of the style of the work:

ATTORNEY GENERAL v. SOULE.

Error to Ionia. Decree affirmed; the State to pay the taxable costs of the defendants in both courts. See Comp. Laws, § 7407.

STATEMENT.—Soule's will provided funds "for the establishment of a school at Montrose for the education of children, to be expended according to the direction of (the) executors." The executors did not execute the special trust, and the state unsuccessfully brought suit to compel them to do so, or else to cast upon the court the duty of carrying out the trust according to the doctrine of approximate execution.

1. *Charitable bequests sued for by State.*—The basis of suit by the state for a charitable bequest is, that there has arisen such a public right, as makes it the state's duty, through its law officer, to take action for its enforcement; there is no public right of intervention, unless the gift is definitely to a charity, such as equity recognizes, and one more or less public or general.

2. *Public application of bequests.*— If a bequest is such that it may or may not be used for a *charity*, and is ambiguous as to the *public* or *private* quality of the charity, and if, consistently with the will, the fund may be applied to a purpose not public, the attorney general cannot interpose to compel a public application.

3. "*Establishment of school;*" *how construed.*—The term "establishment of a school," in a bequest for such a purpose, may mean the employment of a teacher, or the organization of an institution, or the erection of a building, or part or all of these things, and it does not bind the executors to any specific scheme, nor preclude them from erecting a school of an exclusive character, in no just sense public, nor to be recognized as a charity.

ATWOOD v. CORNWALL.

Error to Kalamazoo. Judgment reversed.

STATEMENT.—Atwood paid Cornwall a counterfeit fifty-five dollar bill. Five months later, Cornwall, having meanwhile transferred it and received it back with the information that it was bad, returned it to Atwood, and sued him for the amount. Atwood obtained judgment in a justice's court, but Cornwall recovered in the circuit.

4. *Proof of counterfeits.*—In a suit to recover the amount of a bill the genuineness of which is disputed, evidence of the conversations and opinions of persons through whose hands it has passed is foreign to the question of its identification, and not being lawful evidence of its bad character, ought to be excluded as in the nature of hearsay. But its character may be shown by the expert testimony of a banker.

5. *Guaranty of negotiable paper.*—A person passing negotiable paper, warrants its genuineness to the extent that if it is found bad, and returned within a proper time, he must make it good.

6. *Recovery barred by negligence: estoppel.*—A party who would otherwise be able to recover back the amount of bad money passed upon him, will be debarred of his action by lack of diligence. If payment of what is supposed to be legal-tender paper is to be regarded as contingent and not absolute, the receiver should be regarded as having elected to retain it, unless he uses speedy and active diligence to determine its character, and to notify the giver in order that the latter may protect himself against prior parties. Where "unnecessary delay" appears, the taker cannot keep alive the liability of the giver, and shall not recover. For cases of estoppel, see Camidge v. Allenby, 6 B. & C. 373; Jennison v. Parker, 7 Mich. 355; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Phœnix Ins. Co. v. Gray, 13 Mich. 191; Edwards on Bills. 207, 551.

7. *Familiarity with legal tender.*—Inasmuch as all creditors must receive coin and legal tender paper in payment, if offered, and as they refuse a tender thereof at their peril, the law assumes that every business man will become generally familiar with the money of his country, so as to be able to exercise a judgment upon it.

8. *Innocent takers of bad money in equal equity.*—The innocent taker of counterfeit money is not generally guilty of culpable negligence, and among several takers, one cannot be held more in fault than the rest for not detecting the cheat. The common law seems to indicate that of two innocent parties, the taker of counterfeit coin cannot claim recourse against him from whom he took it, (Sheppard's Touchstone, 140; Wade's case, 5 Co. 114), probably because parties in equal equity shall not be disturbed.

9. *Distinctions between worthless paper.*—For distinctions between counterfeit and otherwise valueless paper, see Edwards on Bills, 205-7, and note.

We heartily commend this effort of Mr. CHANEY, and hope it will serve as a model for imitation in other states. Considering the exceptionally high character of the supreme court of Michigan, we should think it would meet with considerable patronage outside of that state. We shall avail ourselves of the privilege of abstracting from its columns freely for the benefit of our readers.

THE SPIRIT OF LAWS. By M. de Secondat Baron de Montesquieu, translated from the French by Thomas Nugent, LL.D. A new edition, carefully revised and compared with the best Paris edition, to which are prefixed a memoir of the life and writings of the author, and an analysis of the work by M. D'Alembert. Cincinnati: Robert Clarke & Co., 1873.

Montesquieu, in his day, one of the leading intellects of the civilized world, did not seek to lay down any code of so-called "natural laws;" nor was it his object to unfold a favorite system of his own which should at once revolutionize the jurisprudence of European states. He aimed to present in this, his great work, upon which the best years of his life were spent, a clear and logical statement of the results of his immense reading and extensive observation, regarding the different kinds of laws which men can have, the comparisons which can be made between them, and their relations with those things concerning which they prescribe rules. The store of materials, which by the voyages and discoveries of the seventeenth and eighteenth centuries, were at the disposal of the sociologist, were used by him with freedom and yet with a scrupulous anxiety to avoid false conclusions.

The reception given to his work by the leading minds of France, showed that in a century when intellect seemed subservient to despotism, the spirit of progress and of civil freedom was abroad in the hearts of many who, perhaps, wondered that

"* * * he dared to speak,
What some scarce dared to think."

He lived, thought, and wrote at the right time, and, though seemingly, far ahead of his age—was really its living, daring exponent.

His biographer says of him: "He first made himself, as it were, a stranger in his own country, that he might know it better. He next visited Europe, and with the deepest attention enquired into the characteristics of the several peoples by whom it was inhabited. In fine, he had examined and judged nations and eminent men that no longer exist, but in the annals of the world. Thus he gradually rose to the highest title a wise man can attain, that of legislator of nations."

Natural law, divine law, ecclesiastical law, civil law, political law, international law, all are discussed,—and the principles which prescribe their nature and which determine their objects, are announced.

While dwelling upon the Romans and the French as the peoples whose fame and interesting history make them especially useful as examples of the application of his principles, M. de Montesquieu evidently finds the highest political freedom established by the constitution and laws of England. Nor is it remarkable that he should be filled with admiration for that government, which then exhibited in its well-balanced stability, and in the apparent contentment and prosperity of its people, such a contrast to his native land, where checks upon an absolute monarchy were unheard of, and the mass of people were sunk in such misery as to lead De Tocqueville, in writing of them, to say, "No such state of things existed in any other great nation of civilized Europe. * * * * Crushed for centuries under the weight of abuses which no one shared with them, living alone, and brooding silently over their prejudices, their jealousies, and their hatreds, they were hardened by their hard experience, and were as ready to inflict as to bear suffering." This liking for the plan upon which the English government was administered, is displayed quite freely throughout the work; and as our own constitution bears a close resemblance, in many important particulars, to that of England, his views become of living interest to us Americans. Indeed, no student of law or of politics in any wide sense, can afford to neglect him. The style of the work is an admirable example of the superiority of the great writers of France to all other European writers, in the art or power of perspicuity. The most profound thoughts are expressed in the most simple and intelligible forms of speech. It is this virtue which makes his history—if so we may call it—of civil jurisprudence most simple and comprehensive. He always announces his opinions in terms perfectly unambiguous. He is, however, too fond of strewing his work with epigrams, brilliant and ingenious, but wearisome from their abundance.

Of the translation but little need be said. That of Dr. Nugent, of 1750, is retained; and that it is a faithful one we have the testimony of the author himself in a letter to the translator, in which he says: "Your translation has no blemishes but those of the original which are to be charged to my account; and I am much obliged to you for your ability in concealing them from the public eye." Montesquieu's epigrammatic French is rendered into clear and vigorous English.

CALIFORNIA CITATIONS: An Aphabetical Table of all the Cases cited in the Opinions of the California Reports, and of the California Cases cited in the Reports of the other States; with the points as to which they are Cited, Approved, Affirmed, Criticized, Doubted, Denied, or Overruled. By ROBERT DESTY, Attorney-at-Law. San Francisco: Sumner Whitney & Co. Price $7.50.

This work resembles somewhat in plan Bigelow's Overruled Cases. It is, however, much fuller, in that it states the *point* as to which each case has been cited, commented upon, overruled, doubted, etc. On the other hand, it embraces only such cases as have been cited in the reports of California. Works more or less similar to this have been found useful in other states. Linn's Index of Pennsylvania, Wait's Table of New York Cases, and Wendling's Index to Illinois Reports. This work will be indispensable to every lawyer in California, and will be a valuable addition to every bar and private library. If every state in the Union had an index of this character, it would be easy, by putting them together, to make a concordance of American cases which would be of infinite value to the practitioner.

The author has displayed considerable care and industry, and the publishers have brought out the work in excellent style.

THE LAW OF REMEDIES FOR TORTS, INCLUDING REPLEVIN, REAL ACTION, PLEADING, EVIDENCE, DAMAGES. By FRANCIS HILLIARD. 2d edition, greatly enlarged. Boston: Little, Brown & Co.: 1873. pp. 771. Sold by Soule, Thomas & Wentworth, St. Louis.

The profession is familiar with the various legal works of Mr. Hilliard, and with his mode of constructing them. The practical judgment of the bar establishes that they are *useful*: and this is a great merit. "The Law of Torts" is, perhaps, the best of his productions, and has been received with no inconsiderable favor by the body of the profession, The work before us, on the "*Remedies* for Torts" is a supplement or sequel to the former, but can be used either independent of it, or in connection with it. It was prepared afterwards, and the new matter in it ought, for convenience sake, to have been incorporated into the first work. If the author would hereafter recast the two works and throw them into one, he would render a service which those who have occasion to use the books, would not fail to appreciate. The work before us is the second edition, and the statement in the title page that it is "greatly enlarged," is borne out by the volume, which shows an increase of about two hundred pages.

Legal News and Notes.

—JUDGE R. W. HUGHES, the recently appointed judge of the United States district court, has arrived in Norfolk, and will make preparations to take up his permanent residence there.

—MRS. DELIA SHELDON DRUMMOND, the lamented wife of the Hon. THOMAS DRUMMOND, judge of the United States circuit court at Chicago, was buried in Graceland cemetery in that city on Thursday the 22d inst.

—THE house committee on the judiciary has not yet considered the Judge DURELL impeachment case, all the evidence not yet being in printed form for the information of its members.

—WE regret to learn that Judge EMMONS of the sixth circuit, is still suffering from a deprivation of his sight. We trust that this affliction is but temporary, and that the country is not to be deprived of the benefit of his clear judicial mind and great learning.

—MR. EDMUNDS of Vermont, has introduced a bill in the senate to provide assistance to circuit judges in certain cases. It authorizes the employment of a secretary, at a salary not exceeding $2,500, to assist any federal judge who, by reason of physical infirmity, is unable, in the opinion of the attorney general, to perform his judicial duties without such assistance. Referred to the committee on the judiciary.

—IN the Tichborne case, last week, Mr. Hawkins concluded his summing up for the prosecution with a passionate vindication of Lady Radcliff, who, he declared, had never been soiled by the filthy, blighting, unholy, and unnatural touch of the defendant.

—THE supreme judicial court in Boston, affirmed the decree of Justice DEVONS in committing for six months, for contempt of court, J. W. Cart-

wright, one of the receivers of the Hide and Leather Insurance Company, and former president thereof, for withholding and applying to his own use some $12,000 of the assets of the company.

—Mr. Mills of Texas, has introduced a bill to repeal all laws authorizing the formation of associations of persons for the purpose of banking, which, if it become a law, will abolish all national banks, and provide for the settlement of their accounts at the treasury and the surrender of the bonds upon which their circulation was based. The bill was referred to the committee on banking and currency.

—The Supreme Court of the United States adjourned on Friday last until Monday the 2d of March. This recess is taken to enable the judges, who have a large number of cases before them, an opportunity to fully examine them and prepare opinions, etc. The court has accomplished more business this session up to the present time, than has been heretofore done in a full session. On the re-assembling of the court, the chief justice will take his seat.

—Hon. James Thompson, late chief justice of the supreme court of Pennsylvania, died suddenly in the supreme court room in Philadelphia, on the 28th instant, while engaged in the argument of a cause before the supreme court in *banc*. A colloquy of a not unpleasant character had taken place between the counsel and the bench, and Judge Thompson was leaning on a desk, about to resume his argument, when he dropped down, and in five minutes ceased to live.

Judge Thompson was born in Middlesex, Berks county, Pennsylvania, October 1, 1806. He received a good education, and after leaving school entered a printing office for the purpose of learning type-setting. He commenced the study of law, and in 1828 he was admitted to the bar. His talent and energy speedily gained him a good practice, and turning his attention to politics, he was thrice elected to the legislature—in 1832, 1833, and 1834. During his last term he was elected speaker of the house, and made a very excellent impression as a presiding officer, by his knowledge of parliamentary rules, and firmness and impartiality. In 1836 he was a presidential elector, and for six years he sat in the district court as presiding judge. In 1845 he was elected to congress and served until 1851. He was elected judge of the supreme court of Pennsylvania for fifteen years, in 1857, and was the democratic candidate for re-election in October, 1872, but was defeated. During the latter part of his term he was chief justice.

—Mr. Alvord has introduced a bill into the New York Assembly, to regulate the purchase and sale of gold bullion, gold coin or United States treasury gold certificates. The bill provides that all contracts for future delivery beyond the day of contract, whether it be seller's or purchaser's option or for a day certain, are hereby declared to be fraudulent and wholly void, unless at the time of the making of any such contract of sale, the seller shall actually have and hold in his possession, as his own property, such gold bullion, gold coin, or United States treasury gold certificates, and shall continue thus to hold, possess and own them, ready to be delivered at the time for the fulfillment of such contract, undiminished in the quantity required by the terms of the contract. Rules and regulations of associations contrary to these provisions, when enforced or published, are made a misdemeanor and subject to a fine of not not less than $500 nor more than $5,000, or six months' imprisonment, or both.

—Since the bankrupt bill has passed the house, the judiciary committee of the house have been in constant receipt of communications from different sections of the country, nearly all of which object to a repeal of the law, but all asking more or less modification of the existing law; and there are quite as many minds as there are persons writing, each of whom suppose they have the exact remedy for existing difficulties.

—The principal feature of the Indiana financial bill, introduced recently by Mr. Orth, of that state, into the national house of representatives, is the provision permitting any holder of a United States bond to take it to the treasury and exchange it for currency, and *vice versa*—exchanging one for the other back and forth at pleasure. Another provision authorises the the secretary to prepare two thousand million dollars of greenbacks, to hold in reserve, in readiness to exchange for bonds, or *vice versa*, as called for. The bill covers eighty-five pages of legal-cap manuscript, and is indorsed by petitions from twenty-seven counties of Indiana. Mr. Orth states that he introduced it at the request of petitioners, and will make a speech in its favor.

—Mr. Conkling's bill to provide for an international commission of the maritime powers to lay down ocean courses for steam vessels, and otherwise provide for increased safety of sea travel, directs the president to appoint a commissioner on the part of the United States, to meet with such other commissioners as may be appointed by foreign maritime powers, whose co-operation he shall invite for the above described purpose. The United States commissioner is to be confirmed by the senate. The bill is to be framed in accordance with the memorial of the New York chamber of commerce on said subject.

—In 1869 or '70, Amanda Rushing, a married daughter of Isaac Kembro, of Davidson county, brought suit in the circuit court for damages alleged to have been sustained from his whipping her. She was rendered judgment for $3,500 damages, when the defendant appealed to the supreme court, where the judgment of the court below was affirmed. It appears that, between the time of the alleged whipping and the bringing of suit, the defendant, by deed of gift, transferred all his property to his remaining children. Mrs. Rushing now files a bill in the chancery court alleging that the conveyance to the remaining two children was fraudulent, and made for the purpose of defeating her claims and those of other creditors against him, and asks that the conveyance on this account be set aside.—*Nashville (Tenn.) Banner.*

Notes and Queries.

Editor Central Law Journal.—In view of the question and answer in your first issue, this question suggests itself: If the state supreme court, in a certain case has passed on questions involving a construction or an interpretation of the statutes, will the federal court for that state, for that reason, in an *analogous* case, follow the decisions of the former?

Answer.—If the decision of the state court were not upon the same, but only upon an *analogous* question, we presume it would have not an authoritative, but only a persuasive force.

*** We hold over several questions proposed by correspondents, for future attention.

Notes of English Decisions.

[From the Law Times.]

Attachment for Disobedience of order to produce Documents—Servant forbidden to produce by Master—Corporation—Common Pleas at Lancaster.—In obedience to the instructions of his directors, and in disobedience of the order of the district prothonotary of the common pleas at Lancaster, and of the order of an arbitrator, the secretary of a railway company refused to produce before the arbitrator numerous books and papers of the company, which the attorney of the plaintiff in the case referred to swore to be material to the plaintiff's case: Held, that the secretary, being in the position of a servant, was justified in obeying the orders of his masters not to produce the documents, and a rule to attach him for contempt discharged. Whether an action would lie in such a case, *quære:* (Crowther v. Appleby; Re Sharpley, 29 L. T. Rep. N. S. 580. C. P.)

Equitable Mortgage—Agreement to execute Legal Mortgage—Marriage Articles—Settlement—Constructive Notice—Priority.—In 1866, L. deposited with a bank the title deeds of certain real estate to secure the balance of his account, and at the same time he executed a memorandum by which he agreed to execute a deed for legally carrying out the security. In 1871, two days before his marriage, articles were executed by which he agreed to settle the same property, stating, in answer to enquiries by the solicitor of the intended wife, who prepared the articles, that the property was unincumbered, and that the title deeds were at his banker's for safe custody. Shortly after the marriage a settlement was executed by which he conveyed the legal estate in the property to the trustee of the settlement. On a bill by the bank for foreclosure, Held, that it was the duty of the solicitor to have made further enquiries of the bank; that the intended wife must be taken to have had constructive notice of the equitable charge in favor of the bank, and that the plaintiff was entitled to a foreclosure: (Maxfield v. Burton, 29 L. T. Rep. N. S. 571. Rolls.)

Power of Appointment—Execution—Doctrine of Cy-Pres—The donee of a power of appointment of an estate to one or more of the children of A., by his will devised the estate to B., the son of A., for life, with remainder to the first and other sons of B. (who were not objects of the power) in tail male. Held, that the *cy-pres* doctrine was applicable, and that B. took an estate tail; (Dine v. Hall, 29 L. T. Rep. N. S. 568. Rolls.)